IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

RAYMOND WARE, Plaintiff, v. SIDNEY HAYAKAWA, Director of Transportation Security Administration - Honolulu, KEN KAMAHELE, Deputy Director, TRANSPORTATION SECURITY ADMINISTRATION; MICHAEL CHERTOFF, Secretary, Department of Homeland Security, DEPARTMENT OF HOMELAND SECURITY; JOHN DOES 1-5, Defendants.	CIVIL NO. 04-00671 HG LEK MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

Plaintiff Raymond Ware alleges that defendants Sidney Hayakawa, Kenneth Kamahele, the Transportation Security Administration (TSA) and the Department of Homeland Security (DHS) (collectively, the federal defendants) discriminated against him in connection with his employment as a TSA airport security screener. His First Amended Complaint ("Complaint") claims that the federal defendants discriminated against him on the basis of his race by not rotating him to into screening manager positions between October 2002 and February 2003 and by not selecting him for a screening manager position in June 2003. After he filed an EEO complaint about these decisions in August,

2003, he complains, TSA discriminated against him on the basis of race and protected activity in two more decisions: the decision not to select him for a screening manager position in September 2003, and the decision to terminate his employment in November 2003.

Plaintiff cannot maintain any of these claims. Because the only proper defendant in a Title VII case against an agency of the United States is the secretary of that agency, the court should dismiss the complaint against the other defendants. The court should also dismiss plaintiff's claim about his nonselection as a rotating screening manager ending in February 2003; since plaintiff did not consult with an EEO counselor until June 2003, well after the 45-day time limit, the court lacks jurisdiction over the claim because he failed to exhaust his administrative remedies.

The court should also grant summary judgment to defendants on all four of plaintiff's claims of discriminatory personnel actions. The undisputed facts show that TSA made each of the decisions for nondiscriminatory reasons, and plaintiff will be unable to produce evidence of discriminatory intent to rebut that showing. TSA did not select plaintiff as a rotating screening manager ending in February 2003 because the permanent screening managers did not mention him as one of the top performers. TSA did not select plaintiff for screening manager positions in June

2003 because TSA did not consider any current employee for the positions. TSA did not select plaintiff for screening manager positions in September 2003 because, unlike the successful applicants, TSA supervisors had expressed substantial concerns about plaintiff's performance and skills. Finally, TSA terminated plaintiff's employment in November 2003 pursuant to a mandatory policy that required termination of any screener who failed to pass a recertification test administered by a contractor; plaintiff was terminated because the contractor told TSA that plaintiff had failed the test. Because plaintiff will be unable to demonstrate that these reasons are a pretext for discrimination, defendant will be entitled to summary judgment on all of plaintiff's claims.

I. THE COURT SHOULD DISMISS DEFENDANTS HAYAKAWA, KAMAHELE, DHS AND TSA, SUBSTITUTE SECRETARY CHERTOFF

It has long been settled that Title VII is the exclusive judicial remedy for claims of discrimination in federal employment, and that the courts lack jurisdiction over all other claims arising from federal personnel decisions. Brown v. General Servs. Admin., 425 U.S. 820, 835 (1976). Due to its comprehensive scope, Title VII preempts other causes of action seeking to redress the same wrong, including constitutional claims or tort claims based upon the same discriminatory employment actions. Brown, 425 U.S. at 835; Williams v. General

Servs. Admin., 905 F.2d 308, 311 (9th Cir. 1990). The only proper defendant in a Title VII case is the secretary in charge of the relevant Cabinet department. 42 U.S.C. § 2000e-16(c) ("the head of the department, agency, or unit shall be the defendant"); Romain v. Shear, 799 F.2d 1416, 1418 (9th Cir. 1986) (defining these terms to require suit against Secretary only, and dismissing individual defendants).

Here, plaintiff is a former employee of the Department of Homeland Security. Therefore, Secretary Chertoff is the only proper defendant, and defendants Sidney Hayakawa, Director of Transportation Security Administration-Honolulu, Ken Kamahele, Deputy Director, Transportation Security Administration-Honolulu, the Transportation Security Administration, and the U.S. Department of Homeland should be dismissed from this lawsuit.

II. THE COURT SHOULD DISMISS PLAINTIFF'S CLAIMS ABOUT THE ROTATING SCREENING MANAGER POSITION BECAUSE PLAINTIFF FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES

To present a claim under Title VII of the Civil Rights Act, an employee must exhaust his administrative remedies by contacting an Equal Employment Opportunity (EEO) counselor "within 45 days of the date of the matter alleged to be discriminatory or ... within 45 days of the effective date of the [personnel] action." 29 C.F.R. § 1614.105(a)(1). Failure to raise an issue within 45 days deprives the court of subject

matter jurisdiction over the claim. Lyons v. England, 307 F.3d 1092, 1105 (9th Cir. 2002). The 45-day time requirement functions as a "statute of limitations for filing suit." Johnson v. United States Treasury Department, 27 F.3d 415, 416 (9th Cir. 1994).

Here, plaintiff claims that TSA discriminated against him "by not assigning him as a rotating screening manager from October 2002 through February 2003." Compl., ¶ 15. Plaintiff did not contact an EEO counselor, however, until June 23, 2003, well outside the 45-day limitations period. Ex. C to Concise Statement.

This fact does not end the inquiry, however. The timely filing of a charge of discrimination with the EEO "is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982). The Ninth Circuit has noted that the doctrine has been applied "sparingly; for example, the Supreme Court has allowed equitable tolling when the statute of limitations was not complied with because of defective pleadings, when a claimant was tricked by an adversary into letting a deadline expire, and when the EEOC's notice of the statutory period was clearly inadequate." Scholar v. Pacific Bell, 963 F.2d 264, 268 (9th Cir. 1992). In Santa Maria v.

Pacific Bell, 202 F.3d 1170 (9th Cir. 2000), the court distinguished between equitable estoppel, "sometimes called fraudulent concealment", which applies where a defendant has misled plaintiff in delaying a filing, and equitable tolling, which may be available when a reasonable plaintiff would not have known of the possibility of an EEO claim within the limitations period. Id. at 1176-79.

Plaintiff here will be unable to establish entitlement to equitable estoppel, equitable tolling or any other grounds to escape the running of the statute. Defendant did nothing to mislead plaintiff, and plaintiff was aware that he was not being assigned as a rotating screening manager when the assignments were made. Accordingly, the court should dismiss these claims for lack of subject matter jurisdiction.

III. THE COURT SHOULD GRANT SUMMARY JUDGMENT TO DEFENDANTS ON ALL FOUR OF THE PERSONNEL ACTIONS

A. Legal Standards

1. General Standards Governing Motions for Summary Judgment

Federal Rule of Civil Procedure 56(c) allows a district court to grant summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.”

In Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1047 (9th Cir. 1995), the Ninth Circuit succinctly described the showing a party moving for summary judgment must make and the corresponding burden a party opposing summary judgment must carry to thwart the motion. A party seeking summary judgment must "identify those parts of the record that indicate the absence of a genuine issue of material fact." Id. at 1048 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)). Once the party seeking summary judgment meets its burden, the nonmoving party must "designate 'specific facts showing that there is a genuine issue for trial.'" Id. (quoting Celotex, 477 U.S. at 324). The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587. Further, if the evidence proffered by the party opposing the motion is "merely colorable, or is not significantly probative," summary judgment may appropriately be granted. Id. (quoting Liberty Lobby, 477 U.S. at 249-50). "The possibility that the plaintiff may discredit the defendant's testimony at trial is not enough for the plaintiff to defeat a properly presented [summary

judgment] motion." United Steelworkers of America v. Phelps Dodge, 865 F.2d 1539, 1542 (9th Cir. 1989) (en banc), cert. denied, 493 U.S. 809, 110 S.Ct. 51.

The party opposing summary judgment must demonstrate that the fact in contention is material, i.e., that it might affect the outcome of the suit under the governing law, Liberty Lobby, 477 U.S. at 248; T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, Anderson, 477 U.S. at 248-49. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex, 477 U.S. at 322.

2. Summary judgment in Title VII cases

"Liability in a disparate treatment case 'depends on whether the protected trait [national origin, race, and gender] actually motivated the employer's decision.'" Raytheon Company v. Hernandez, 540 U.S. 44 (2003) (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). Accordingly, this race, national-origin and gender-based non-selection claim can be analyzed with the three-part burden shifting scheme first enunciated in McDonnell Douglas v. Green, 411 U.S. 792 (1973). In keeping with this scheme, plaintiff has the initial burden to

establish a prima facie case of discrimination. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for taking the action. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The burden on the employer is one of production rather than proof or persuasion. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) ("The defendant need not persuade the court that it was actually motivated by the proffered reasons").

If the defendant meets this burden, the plaintiff must then prove by a preponderance of the evidence that the employer's articulated reasons are a pretext for discrimination. Id. The "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Id. Plaintiffs may establish pretext (1) by direct evidence if it proves the fact of discriminatory animus without inference or presumption, or (2) by specific and substantial indirect circumstantial evidence. Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1221-22 (9th Cir. 1998).

B. Defendants Had Legitimate Reasons for Each of the Personnel Actions Complained of by Plaintiff

As set forth in the declarations attached to the government's Concise Statement, TSA had legitimate non-

discriminatory reasons for each of the personnel actions challenged by lawsuit. The first three decisions were made by Kenneth Kamahele. As set forth in detail in defendant's Concise Statement, Kamahele did not select plaintiff as a rotating screening manager from October 2002 to February 2003 (Compl., ¶ 14) because the permanent screening managers told Kamahele that other screening supervisors were more qualified. Kamahele did not select plaintiff for promotion to screening manager (Compl., ¶¶ 16, 18) because he did not consider any current TSA employees for those temporary positions. Kamahele did not select plaintiff for promotion to screening manager in September 2003 (Compl., ¶¶ 20, 22) because Kamahele was aware that, unlike the successful applicants, plaintiff had a history of counselings, disciplinary reports and negative reports from supervisors. TSA terminated plaintiff from his position (Compl., ¶¶ 29-31) because termination was required after he failed a mandatory recertification test administered by a contractor.

Plaintiff will be unable to produce evidence of discriminatory intent, arising from either a racial or retaliatory animus, to rebut this showing of a legitimate non discriminatory grounds for each of the personnel actions. Accordingly, defendants will be entitled to summary judgment on all of plaintiff's claims.

IV. CONCLUSION

For the foregoing reasons, the court should dismiss plaintiff's claim and grant summary judgment to defendants.

DATED: June 14, 2006, at Honolulu, Hawaii.

EDWARD H. KUBO, JR.
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/s/ Thomas A. Helper
By _____
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